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NO: 97-334

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term 1996

CHARLES G. MILDEN and
SUSAN P. MILDEN, debtors,
Petitioners,

vs.

JAMES J. JOSEPH, Trustee,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

***

PETITIONERS' REPLY TO RESPONDENTS' TWO BRIEFS IN OPPOSITION TO THIS PETITION

***

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REPLY

On or about September 22, 1997, Respondents State of the Art, Inc. (SOTA), Robertson Stephens & Co. (combined with SOTA), and separately Frank A. Barcott, dba Frank A. Barcott Security and Investigations, filed their respective briefs opposing this Petition for Writ of Certiorari to the United States Supreme Court.

Both Respondents have alleged in their briefs that petitioners have incorrectly stated the questions sought to be reviewed, and each brief portends to submit other questions instead. The Respondent-restated questions and Petitioners' responses to their restatement are as follows:

> 1(a). [Barcott] *"Whether Petitioners may argue that the underlying bankruptcy was wrongfully converted to a Chapter 7 proceeding when they did not timely appeal from the conversion order?"*
>
> 1(b). [SOTA/Robertson Stephens] *"Does the federal district court, the court of appeals, or this Court have jurisdiction to entertain the merits of Petitioners' appeal from the bankruptcy court's order converting their case from chapter 11 to chapter 7, where Petitioners failed to file a notice of appeal from that order?"*

Response: Petitioners were empowered under Rule 9024 F.R.Bktcy.P to file motions pursuant to Rule 60(b)(2) and Rule 60(b)(4), as circumstances may have warranted. Circumstances did warrant so, and Petitioners made the appropriate argument to the lower courts. See Petition at pp. 11.

Whether or not the conversion of this specific case was authorized under law required the federal courts to view the statutory language of 11 U.S.C. §1112 in terms of the operative limitations of the First, Fifth, Seventh, and Tenth Amendments, as generally set forth in Petition at pp. 8-15, and embraced in each of the five Questions Presented for Review by Petitioners. These issues have all been posed to the lower courts below, and ignored by each of the federal

judges involved. Instead of dealing directly with Petitioners' issues, the lower courts have relied upon their own prior decisions involving different circumstances as controlling upon Petitioners' arguments.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional issues brought here that bankruptcy law *as applied* has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

> 2(a). [Barcott] *"Whether the bankruptcy and district courts had jurisdiction to approve the trustee's settlement of the estate's state court lawsuit?"*
>
> 2(b). [SOTA/Robertson Stephens] *"Did the bankruptcy court have subject matter jurisdiction to approve a settlement of a state court action filed pre-petition by Petitioners?"*

Response: The record is clear below that the bankruptcy judge made his order predicated upon the alleged trustee's assurances that the proposed settlement of a pending state court action was warranted. "Jurisdiction" generally defined is the power to decide an issue one way or the other.[1]

By definition above, all "jurisdiction" to look at and form any manner of opinion upon the merits of a case involving residents of California, doing business in California, and arising under the laws of the State of California, was vested in the California Superior Court where the case upon the issues duly claimed for litigation was pending, and a jury trial had been duly demanded.

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1 Black's Law Dictionary in relevant part states: "A term of comprehensive import embracing every kind of judicial action. Federal Land Bank of Louisville, Ky. v. Crombie, 258 Ky. 383, 80 S.W.2d 39, 40. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 ...."

The U.S. Bankruptcy Court, where no action to remove the case from state court had been filed, not only lacked any cause to presume jurisdiction over the subject matter or parties in that case, but was barred from conducting a jury trial.

Any information relating to the merits of the case that may have been presented to the bankruptcy judge was hearsay information outside the court of competent jurisdiction. The case pending in state court is comprised of substantial issues involving personal injury to the physical, mental and emotional well being of Petitioners, as well as further issues of shareholder fraud under California securities law.

For the reasons set forth in Petition at pp. 15-19, substantial damages were sustained to the persons of the Petitioners, and thereby were damages not sustained to the property of the Petitioners. Such damages were not property of the estate because they were not damages to "property" as meant under common law. See Petition at 22-25.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional issue brought here that case law *as applied* has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether or not a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

3. [SOTA/Robertson Stephens] *"Did the bankruptcy court have subject matter jurisdiction to approve the Trustee's use of the stock of a corporation, wholly owned by Petitioners pre-petition, to effect a release of the corporation's claims against third parties?"*

Response: 28 U.S.C. §959(b) commands a trustee to *".. manage and operate the property in his possession as such trustee ... according to the requirements of the valid laws of the State in which such property is situated ..."* The Respondents have conceded in the text of their brief that the acts of the alleged trustee have been committed in violation of the laws of *"... the State in which such property is situated*

...", but claim along with the federal courts of the Ninth Circuit that prior federal court decisions are superior to the laws of the State of California. Article I, Sec. 8, cl. 4 of the Constitution of the United States empowers Congress to write the uniform laws on bankruptcy. This includes the plenary power to impair the obligations of contracts, but it does not include the power to override non-contract state law. See: Article X of the Articles of Amendment to the Constitution of the United States.

This general issue arises under Petition Questions 1, 2, and 5, but it extends beyond the Petitioners to the rights of other entities never noticed or made subject to the personal jurisdiction of the federal court system in California. The activity of the alleged trustee was perpetrated against the post-petition continuing interests of the debtor petitioners, as well as the business interests of a California corporation that is not a party to any case under title 11. This issue presents a serious disregard of corporate by-law procedures, California State law, and federal statutory law upon the use of assets of an estate by a fiduciary. The alleged trustee has presented as his sole argument that the action he took against a third party corporation outside the personal jurisdiction of the bankruptcy court was condoned by the bankruptcy judge and title 11 because he needed to impair this third party's property right in order to protect the Respondents from liability to the third party corporation at trial outside the Petitioners' reorganization.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional and federal statutory issues brought here that case law ***as applied*** has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether or not a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

Other matters raised by the Respondents Briefs:

1. Neither the alleged trustee, nor the government, have filed a brief in opposition. This circumstance leaves the Respondents (who have struck the compromise deal whereby they would compensate the alleged trustee the sum of

$145,000.00) to vehemently protest an appeal by Petitioners that is directed at obtaining a reversal of the conversion and dismissal of their own personal Chapter 11 proceeding. Respondents are also curiously and vehemently opposed for Petitioners to enforce their right to face a jury at a state trial where SOTA has alleged a $6 million damages claim against Petitioners. Respondent SOTA's argument that *"Rather than face the jury they now claim to demand,..."* flies in the face of the record in the bankruptcy court, the district court and the appeal filed with the Ninth Circuit of Appeals where Petitioners have continually asserted their right to and demand for a jury trial.

2. Respondents have been somewhat less than gentlemanly in their harsh and unsupported attack upon Petitioners' motives, deeds and character. Petitioners wish to deal with these false allegations at a trial.

It is nevertheless a fact that Rutan and Tucker are presently the attorneys of record for SOTA. It is also a fact that they were the attorneys of record during SOTA's fraudulent Initial Public Offering ("IPO"). It is also a fact as attorneys of record Rutan and Tucker necessarily knew of the false representations which were made in a S-1 Registration Statement filed with the U.S. Securities and Exchange Commission and Prospectus provided to prospective SOTA shareholders relating to the past sales value of SOTA stock that far exceeded what was represented (and conveyed) to Petitioners. It is also a fact that Robertson Stephens was the investment banker for SOTA during the fraudulent IPO. Even more interesting, Robertson and Stephens controlled a seat on the Board of Directors for SOTA and as such were SOTA insiders when establishing the price to be paid for Petitioner Charles Milden's stock. It is also a fact that just prior to SOTA's IPO, SOTA hired Barcott to harass, stalk and spy upon Petitioners under the color or law and to spread rumors in their neighborhood that were false and damaging to Petitioners' reputation. It is also a fact that shortly after the episode with Barcott and the filing of a law suit by SOTA the Petitioners discovered that SOTA had defrauded its founder (Petitioner Charles Milden) in an amount greater than $800,000 when they repurchased his stock.

Petitioners do not have the dirty hands in this case, but the Respondents do. The Court should be very concerned over whether the lower courts are being used by entities who have no lawful interest in a personal reorganization under title 11 other than to further their own alleged untoward interests at the expense of the estate.

3. Much has been made of Petitioners' "voluntary" petition status as analogous to a waiver of all civil rights. Petitioners have never waived their civil rights. Petitioners sought only to avail themselves of Congress' declared intent to extend its power to impair the obligations of contract to those who required only a temporary impairment of personal contract obligations. That is why Petitioners "voluntarily" filed a petition for temporary relief under Chapter 11 of title 11.

CONCLUSION

Petitioners have come to the United States Courts for honorable purposes during a period of great personal duress. Petitioners came upon the invitation of Congress who had declared the intention of providing relief from financial burdens long enough to reorganize one's obligations and to honorably meet them.

It is with great sadness that Petitioners report that they have found the congressional promise to have been emptied by the appointees and officers of the very courts Congress intended to carry out its will.

Respondents have presented absolutely no reason why this Petition should not be granted. The Court should grant this Petition to stem the misapplication of law that has resulted in the depravation of rights of the Petitioners as protected by the Constitution of the United States. Granting this Petition would be a constructive step toward stemming the problems of Bankruptcy administration as identified by Congress (See Petition pp. 26-27) and have the added benefit of beginning to remove the stain of cronyism and abuse of innocent people.

Dated: September 30, 1997 Respectfully submitted,

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